86-1464

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ROSA M. CORBETT,
Petitioner,

VS.

PAUL CARLIN, in his capacity as Postmaster General of the United States Postal Service, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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84 pp

QUESTIONS PRESENTED

1. Does section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794] prohibit employment discrimination by the United States Postal Service?

2. To what extent, if any, do the limitations of section 717(c) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-16(c)] apply to a claim of employment discrimination on the basis of physical handicap under sections 501 and 504 [29 U.S.C. §§ 791, 794], of the Rehabilitation Act of 1973?

3. Is the requirement of 42 U.S.C. section 2000e-16(c) that a Title VII complaint against the federal government be filed with the court within thirty days of receipt of the notice of final administrative disposition of the claim a jurisdictional prerequisite to suit in federal court, or, like a statute of limitations, subject to waiver, estoppel or equitable tolling?

4. In jurisdictions where timely service of process can be effected after a statute of limitations has run, should the requirement of F.R.C.P. Rule 15(c) that a new defendant receive notice "within the period provided by law for commencing an action against him" be interpreted to include a reasonable time for service of process?

5. Is the requirement of 42 U.S.C. section 2000e-16(c) that "the head of the department, agency, or unit, as appropriate," be named in a civil action properly interpreted to mean that the United States Postmaster General is the only proper party defendant?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Rosa M. Corbett petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, No. 85-2829 (9th Cir., October 28, 1986) is appended hereto (App. A, infra), and the opinion of the Court of Appeals denying petition for rehearing and suggestion for en banc consideration, No. 85-2829 (9th Cir., January 7, 1987) is appended hereto (App. B, infra). The opinion of the District Court, No. C-82-5980 (N.D. Cal., October 15, 1985) is also appended hereto (App. C, infra).

JURISDICTION

The petition for rehearing and suggestion for en banc consideration (App. B, infra) was denied on January 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1) and Supreme Court Rules, Rule 20.4.

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, provides in relevant part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . by the United States Postal Service . . . .

Section 505(a)(2) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)(2), as amended, provides in relevant part:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 . . . shall be available, with respect to any complaint under section 794.

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, as amended, provides in relevant part:

> (b) Federal agencies; affirmative program plans

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met.

Section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)(1), as amended, provides in relevant part:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 . . . shall be available, with respect to any complaint under section 791.

Section 717(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-16(a), provides in relevant part:

> All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5 . . . in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5

> . . . in the United States Postal Service . . . in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-16(c), provides in relevant part:

> Within thirty days of receipt of notice of a final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Rule 15(a) of the Federal Rules of Civil Procedure provides in relevant part:

Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Rule 15(c) of the Federal Rules of Civil Procedure provides:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Federal Rules of Civil Procedure, Rule 3 provides:

> Commencement of Action. A civil action is commenced by filing a complaint with the court.

Federal Rules of Civil Procedure, Rule 4(a), provides in pertinent part:

> (a) Summons: Issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint.

STATEMENT OF THE CASE

Congress enacted the Rehabilitation Act of 1973 with one basic purpose:

"...to ensure that handicapped individ-

uals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others." [School Board of Nassau County v. Arline, __ U.S. __, No. 85-1277, slip op. at 9 (U.S., Sup. Ct. (March 3, 1987)]. Recognizing that prejudice against handicapped individuals infects the federal government as well as the private sector, Congress amended the Rehabilitation Act in 1978 and made it specifically applicable to the federal government in order that it might become a "model employer of the handicapped."

Notwithstanding Congress' intent to end discrimination against the handicapped in federal government, victims of such discrimination are being routinely dismissed out of court in the Ninth Circuit on the basis of a technical, procedural defect in their complaints: the failure to name the "proper" federal defendant. Moreover, these procedural dismissals often occur in cases brought

by indigent victims who, because of their poverty, are required to draft their district court complaints without the assistance of a lawyer. See, Appendix H, infra. Furthermore, by the time these victims learn that they may have named the "wrong" defendant in their discrimination complaint, the extremely short period of time to file the complaint - 30 days from the date of their "Right-to-Sue" letter - has often elapsed. If they attempt to amend their complaints to substitute or add the "proper" defendant, the Ninth Circuit has ruled they cannot do so because the thirty-day filing requirement is jurisdictional and the "proper" defendant must have had actual notice of the complaint within the thirty days for the amendments to "relate back."

After more than five years petitioner has yet to have the merits of her employment discrimination claim heard by any court. Unless this Court reviews the Ninth Circuit's decision herein, she and others like her will never have their "day in court" and further discrimination by the federal government will not be deterred.

FACTS

Petitioner, Rosa M. Corbett, worked as a permanent part-time distribution clerk with the Main Oakland Post Office of the United States Postal Service when she was diagnosed as having kidney failure. Hemodialysis was the recommended treatment for Ms. Corbett's acute kidney failure. Ms. Corbett requested light-duty status until the hemodialysis was completed. Petitioner anticipated that upon completion of the treatment she

could resume all of her duties. However, rather than grant petitioner's request, respondents fired her.

Ms. Corbett filed a timely employment discrimination charge against the United States Postal Service. On September 29, 1982, Ms. Corbett received the final agency decision. The decision, from Joseph R. Caraveo, Regional Postmaster General, made a finding of no discrimination and informed Ms. Corbett that she could institute a civil action in the appropriate United States District Court within thirty days of the letter's receipt. Although this letter informed petitioner of the appropriate forum for the civil action and the appropriate time for filing the action, the letter is conspicuously silent as to who the proper party defendant in the civil action might be. (App., infra, D-1 - D-2).

On October 29, 1982, petitioner filed her complaint with the district court alleging violations of sections 501 and 504 of the Rehabilitation Act of 1973, and the Fifth Amendment to the United States Constitution.[1] The complaint named Austin Simon, the Postmaster General of the Main Oakland Post Office, Victor Walters, the Director of Mail Processing for the Main Oakland Post Office, and the United States Postal Service. In her complaint, petitioner properly invoked the jurisdiction of the district court pursuant to 29 U.S.C. § 794(a), 28 U.S.C. § 1331, 28 U.S.C. § 1343(4), 39 U.S.C. § 409, and 42 U.S.C. 2000e-(5)(f)(3). The complaint was served on the United States Attorney on November 18, 1982, and on Austin Simon,

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[1] This last claim has been dropped from petitioner's amended complaint.

Victor Walters and the United States Postal Service on November 24, 1982.

Respondents moved to dismiss the complaint claiming that the Postmaster General is the only proper defendant in actions against the Postal Service under the Rehabilitation Act and claimed that, under the Federal Rules of Civil Procedure, Rule 15, petitioner's failure to name the United States Postmaster General or provide the Postmaster General with "actual notice" of the action within thirty days of receipt of her "Right to Sue" letter rendered her complaint fatally defective and deprived the court of jurisdiction over it. Respondents relied solely on the Ninth Circuit Court of Appeals opinion in Cooper v. United States Postal Service, 740 F.2d 714 (9th Cir. 1984), cert. denied, 105 S.Ct. 2035 (1985).[2]

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[2] In Cooper the court dismissed claims against the Postal Service

The district court granted respondents' motion to dismiss on the basis of Cooper. Citing the Ninth Circuit Court of Appeals opinion in Boyd v. United States Postal Service, 752 F.2d 410, 413-414 (9th Cir. 1985), which holds that section 501 provides the exclusive remedy for employment discrimination on the basis of physical handicap within the federal government, the district court also denied petitioner's motion for leave

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assuming, without analysis, and without support in the statutory language of section 717, that the Postmaster General and not the Postal Service was the proper defendant under 42 U.S.C. section 2000e-16(c). Id., at 715-716. The court held that under Title VII, the proper party defendant in a section 717 action is the "head of the department, agency or unit, as appropriate," and since Ms. Cooper had named only the United States Postal Service, her complaint must be dismissed. Further, the court held that Ms. Cooper's failure to name the Postmaster General or provide him with actual notice of the action within thirty days of receipt of the right to sue notice left her without any recourse of amendment under Rule 15. Id., at 717.

to amend her complaint to add a section 504 claim. (App. C, infra).

The United States Court of Appeals for the Ninth Circuit affirmed. The court held that the United States Postmaster General is the only proper defendant in employment discrimination actions against the Postal Service, again citing Cooper. The Ninth Circuit Court held that the thirty-day time limit for filing under section 717 applies to actions brought under section 501 of the Rehabilitation Act and that the limitation is jurisdictional. The court then noted that since petitioner had failed to serve the United States Attorney or the Attorney General within the original thirty-day period, petitioner could not amend her complaint to relate the amendment back under Federal Rules of Civil Procedure, Rule 15, and save her claims. Finally, the court applied its holding in

Boyd that section 501 is the exclusive remedy for discrimination in employment by the Postal Service on the basis of handicap, and dismissed petitioner's section 504 claim. (App. A, infra).

REASONS FOR GRANTING THIS PETITION

Certiorari should be granted in this case for five reasons. First, this Court must determine whether section 504 prohibits employment discrimination by the United States Postal Service. This issue should be decided because the Ninth Circuit Court of Appeals ignored the clear statutory language of section 504, as amended, which on its face prohibits employment discrimination by the United States Postal Service. Moreover, the circuit courts are split on this issue.

In Smith v. United States Postal Service, 742 F.2d 257 (6th Cir. 1984), the court held that section 504 of the

Rehabilitation Act does apply to claims of employment discrimination against the United States Postal Service. Not only is there a conflict between the circuit courts on this issue, the holding in Boyd squarely conflicts with the language of section 504 and this Court's interpretation of the reach of section 504 under the Act.

Second, this Court must decide which of the rights, remedies and procedures of Title VII are incorporated into the Rehabilitation Act under 29 U.S.C. sections 794(a)(1) and 794(a)(2). Petitioner contends that the procedural limitations of 42 U.S.C. section 717 are not applicable to an action brought under either section 501 or section 504 of the Rehabilitation Act. This is so because section 794(a)(1) states that the rights, remedies and procedures of Title VII "shall be available" to a litigant under

section 501. It does not state that such a litigant is limited by procedures. Moreover, section 794(a)(2) states that the rights, remedies and procedures of Title VI "shall be available" to a litigant under section 504. Accordingly, the limitations of Title VII are not automatically incorporated in an action under Section 504. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

Clarification of Title VII's applicability to discrimination claims against the Postal Service brought under the Rehabilitation Act is both essential and critical in that a significant public interest is at stake here: the right of disabled individuals to know which, if any, of the procedures, rights, remedies, and limitations outlined in Title VII apply to their claims. The federal government is one of the largest

employers in the United States, and the United States Postal Service is one of the largest, if not the largest, federal employer. The rights of all physically handicapped federal employees lie in the balance.

Third, there exists a sharp conflict between the circuits with respect to those questions pertaining to whether the thirty-day period is jurisdictional and whether respondents must have actual notice of the action within thirty days after receipt of the "Right to Sue" letter.

Fourth, the Ninth Circuit's decision regarding the proper interpretation of Rule 15(c)'s notice requirement in actions against the federal government involves an important question of law that has not yet been decided by this Court and conflicts with the purpose of Rule 15(c) as presented by the Advisory

Committee in its Note on the 1966 Amendment to that Rule.

Fifth, this Court should clear up existing confusion regarding who is the proper defendant in actions that must comply with the requirements of section 717 of Title VII. Petitioner can only speculate as to the exact number of plaintiffs whose complaints are summarily dismissed by district courts in cases similar to her own. In the Ninth Circuit alone, petitioner is aware of at least five cases which have raised this issue in the last two years. (Cooper v. United States Postal Service, 740 F.2d 714 (9th Cir. 1984), cert. denied, 105 S.Ct. 2035 (1984), Hymen v. Merit Systems Protection Board, 799 F.2d 1421 (9th Cir. 1986), Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986), Allen v. Veterans Administration, 749 F.2d 1386 (9th Cir. 1986), Lofton v. Heckler, 781 F.2d 1390 (9th Cir. 1986). This does not, however, account at all

for those cases dismissed by the district court; such dismissals are not reported. Furthermore, it is no coincidence that in case after case federal employee-plaintiffs who fail to name the proper defendant have their cases summarily dismissed. (See letter of Honorable Marilyn H. Patel, district court judge for the Northern District of California, to Clarence Thomas, Chairman of the Equal Employment Opportunity Commission. (App. D, infra).

In many ways, the procedural obstacles faced by petitioner are common to other federal government employee-plaintiffs who pursue employment discrimination claims. Like petitioner, these other plaintiffs have suffered the unduly

harsh results of a narrow reading of Federal Rule 15 coupled with a restrictive reading of the scope of the Rehabilitation Act. Ultimately, these plaintiffs, future employee-plaintiffs, and petitioner face summary dismissal of their claims unless this Court intercedes.

I.

THIS CASE RAISES IMPORTANT ISSUES NOT YET ADDRESSED BY THIS COURT

A. Important Issues Under The Rehabilitation Act

1. Section 504 As It Applies To Employment Actions Against The United States Postal Service

The court below dismissed petitioner's claim for relief under section 504 of the Rehabilitation Act, relying on Boyd v. United States Postal Service, 752 F.2d 410 (9th Cir. 1985). The availability and parameters of a section 504

claim for employment discrimination against the United States Postal Service is a relatively new question in this and other circuits. This Court recently analyzed section 504 in the context of a private employer and held that it applies to employment. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). The lower court's decision raises questions about the applicability of this Court's holding in Consolidated Rail to the federal government.

The Boyd decision is the only Ninth Circuit decision to date that has addressed this issue, and it relies heavily on the analysis found in McGuinness v. United States Postal Service, 744 F.2d 1318 (7th Cir. 1984), and Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).

The court below and the Boyd Court ignore the statutory framework of the

Rehabilitation Act. In the Boyd decision, the court literally "reads out" Congress' provision of two avenues of redress for employment discrimination under section 501 and section 504.

The plain language of section 504 expressly subjects the United States Postal Service to the mandate of non-discrimination in section 504, and the plain language of section 505(a)(2) specifically makes available to any complainant under section 504 Title VI remedies, procedures, and rights.

Although these decisions suggest that it would be nonsensical for Congress to provide a different set of remedies, having different exhaustion requirements, for the same wrong committed by the same employer, legislative history suggests that Congress in fact had a very good reason for providing two avenues for

redress of physical handicap discrimination against the United States Postal Service. But Congress did just that for two reasons. First, the federal government should be the leader with respect to the employment of handicapped individuals. Prewitt v. United States Postal Service, 662 F.2d 292, 302 (5th Cir. 1981) (citing Hearings Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess., at 1502 (1976); Cong. Rec. § 15591 (Sept. 20, 1978)). Second, the House and the Senate sought to strengthen the Rehabilitation Act by amending both section 501 and section 504.

According to the court in Prewitt, exhaustion of administrative remedies under both sections 501 and 504 was the result of a compromise made by the joint

House-Senate conference committee.[3]

The joint House-Senate conference

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[3] The Prewitt Court made it quite clear after reviewing the legislative history behind the enactment of subsection 505(a)(1) and 505(a)(2) that Congress did indeed create two distinct and separate avenues of redress for employment discrimination against the U.S. Postal Service. Although both the Senate and the House had determined that the federal government should be a "model employer" of the physically handicapped, they could not agree on the procedures and rights that would guarantee this result. The Senate determined that if the physically handicapped were provided the same rights and remedies as other members of suspect classifications (i.e., racial minorities, women, etc.) the federal government would be a "model employer." Prewitt, supra at 303. The House did not agree. Instead, it appears that the House chose to compare the federal government's duties under the Rehabilitation Act to those of a private employer under that same Act. Thus, for the House, the federal government would be a "model employer" of the physically handicapped if it met the same obligations as a private employer under section 504. Prewitt, supra at 303. Because of the Senate's emphasis on providing the same benefits to the physically handicapped that exist for other minorities, it provided physically handicapped individuals with the rights and procedures found in section 717 of Title VII. However, since the House chose to emphasize that the federal government would meet the same obligations as the private sector

committee . . . and subsequently Congress as a whole, chose to pass both provisions, despite the overlap." Id., at 304. What is significant is that both the House and Senate were seriously concerned with strengthening the provisions of the Rehabilitation Act as it applied to the federal government. Each sought to bolster the Act through separate amendments of different provisions of the Act. See, Comprehensive Rehabilitation Services Amendments of 1978, Report No. 95-1780.[4]

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regarding the employment of the physically handicapped, it provided that the federal government would have the same obligations as the private sector under section 504.

[4] Note that at page 93 the Conference Agreement states that the Senate receded with an amendment adding coverage of the provision covered by Section 501(b). This suggests that Congress intended two avenues for vindicating discrimination on the basis of physical handicap.

The resolution of a plaintiff's right to proceed with a cause of action under section 504 is fundamental and affects every potential claim for physical handicap discrimination in employment. It is this right to proceed under section 504 that transforms these legal questions into issues of paramount importance. Any restriction on the right to pursue a section 504 claim imperils the civil rights of all employees to be free from employment discrimination on the basis of physical handicap. This issue is of vital importance and is ripe for this Court's review.

2. Wholesale Incorporation of Section 717 Into The Rehabilitation Act

Both courts below have treated this case as if it were a Title VII case. Specifically, the lower courts have assumed, without analysis, that section 717 of Title VII is applicable to

physical handicap cases brought under an entirely different statutory scheme. In the decision below, the court relied on the Cooper case to establish that the United States Postmaster General is the sole proper defendant in actions against the Postal Service. Cooper, an action alleging sex discrimination, was brought under Title VII and undoubtedly was bound to comply with section 717. The instant case, however, is not brought under Title VII. Rather it alleges violations under the Rehabilitation Act which has its own statutory frame.

The Rehabilitation Act is a separate piece of civil rights legislation enacted to eradicate all forms of discrimination against the handicapped by the federal government, certain of its contractors, and recipients of federal funds. It is not an amendment of Title VII of the 1964 Civil Rights Act. Nor should it be

interpreted as such. Accordingly, provisions of the Rehabilitation Act must be interpreted with this distinction in mind and in light of its own particular language and purposes.

By its enactment of the Rehabilitation Act Congress realized that discrimination on the basis of handicap is a genre of discrimination that requires a different approach to its eradication. Rather than affording plaintiffs a remedy by simply amending Title VII, which Congress had done as recently as 1972 with the Equal Employment Opportunity Act, Congress created a new and comprehensive mechanism for combatting discrimination on the basis of handicap. In so doing, Congress recognized that discrimination facing disabled individuals is not limited to individuals belonging

to a particular race, creed, color, or sex. Congress acknowledged that discrimination on the basis of handicap necessitates an enforcement scheme that is different than the Title VII enforcement scheme. The Cooper case does not address the interplay between Title VII and the Rehabilitation Act; the critical issue that this case raises. In addressing this question, the Court must first examine the language of the Rehabilitation Act itself.

It is a cardinal principle of statutory construction that the court first look to language of the statute itself. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Unlike Title VII, the Rehabilitation Act only makes available the rights, remedies, and procedures set forth in section 717 for section 501

claims. 29 U.S.C. § 794(a). The provisions of section 717 are not mandated by the Rehabilitation Act. Moreover, section 505(a)(2) specifically makes available Title VI rights, remedies, and procedures to complainants under section 504. The decision below did not address this initial question before it applied a limitation of section 717 to petitioner's action by holding that the United States Postmaster General is the sole proper defendant in employment actions against the federal government.

By incorporating the limitation of section 717(c) requiring court action and service on the Postmaster General within thirty days, the intent, history, and purpose of section 505(a)(2) to increase judicial relief for disabled individuals is thwarted. These issues affect every complaint alleging physical handicap employment discrimination under the

Rehabilitation Act against the federal government. Petitioner respectfully requests that this Court address this most significant question.

B. Important Issues Regarding Interpretation of Federal Rule 15

Review here is also required because the interpretation of Rule 15(c)'s notice requirement in the context of a plaintiff's attempt to substitute a proper for an improper[5] federal defendant has not yet been addressed by this Court, and because the Ninth and Seventh Circuits'

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[5] Petitioner is mindful of the significant related issue raised here, whether the Postmaster General is the sole proper party defendant in actions for employment discrimination against the Postal Service. Resolution of this issue turns on the statutory construction of section 717 and will affect every Title VII employment discrimination action and other actions which must comply with section 717 [See, for example, age discrimination cases, Ellis v. United States Postal Service, 784 F.2d 835 (7th Cir. 1986)] filed against the United States Postal Service.

interpretation of Rule 15(c) is incorrect.

The primary purpose of the 1966 Amendment to Rule 15(c) was to rectify the unjust results being reached prior to that time in cases brought under the Social Security Act, in which cases plaintiffs frequently named the United States, or the Department of Health, Education, and Welfare as defendants in actions seeking review of denials of Social Security benefits. See Advisory Committee Note of 1966 Rule 15(c). Under the Social Security Act, an action to review an agency's decision must be brought within sixty days after that decision and must name as the defendant the Secretary of Health, Education, and Welfare. In innumerable cases, directly analogous to the case now before the Court, Social Security claimants instituted timely actions, but mistakenly

named as defendant a party other than the Secretary of Health, Education, and Welfare. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant. But, because the sixty-day period had expired, their motions were dismissed. See Advisory Committee Note of 1966 to Rule 15(c): Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harvard L. Rev. 356 (1967); Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 Harvard L. Rev. 39 (1963). Rule 15(c) was adopted to ensure that these claims could be decided on their merits, rather than being subjected to dismissal on technical procedural grounds at odds with Rule 15(a)'s injunction that leave to amend be freely

granted when the interest of justice so requires.

With respect to suits against the federal government, the new rule provided that the delivery or mailing of process to the United States Attorney or to the Attorney General, in accordance with F.R.C.P. Rule 4, would satisfy Rule 15(c)'s notice requirement. Advisory Committee Note of 1966 to Rule 15(c).

However, both Rule 15(c) and the Advisory Committee Note left unclear whether "the period provided by law for commencement of the action," within which time the new defendant must receive notice of the suit, includes a reasonable time after the filing of the complaint for service of process, as permitted under F.R.C.P. Rules 3 and 4(a). See Ingram v. Kumar, 585 F.2d 566, 571 (2d Cir. 1978), cert. denied, 440 U.S. 940

(1979); Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980).

It is this ambiguity that has led to conflicting interpretations between and within the circuits. The restrictive interpretation applied by the Seventh and Ninth Circuits, which does not permit post-statute service, not only defeats the purpose of the 1966 Amendment, but also leads to the anomalous result that, in a jurisdiction that permits post-statute service of process, a misnamed defendant is entitled to earlier notice than he would have received had the complaint originally named him correctly. Ingram v. Kumar, supra, 585 F.2d at 571. This anomaly demonstrates that the Ninth Circuit view fails to serve any of the policies underlying statutes of limitations, which policies are the only legitimate reasons for denying a motion to amend a complaint. See Advisory

Committee Note of 1966 to Rule 15(c): Kaplan, supra, at 408. The view of the Second, Fifth, Sixth, and District of Columbia Circuits is congruent with the philosophy underlying Rule 15 that leave to amend should be freely given when justice so requires and also preserves the policies underlying statutes of limitations by requiring that the new defendant receive notice within a reasonable period of time after the commencement of the action.

This Court should review the decision below to clarify this important issue of law and to assure that the policies of Rule 15 are not undermined by an overly restrictive interpretation of that Rule.

C. The Proper Defendant In Actions Against The United States Postal Service Under Section 717

This Court has yet to address the question of who is the proper defendant in actions that must comply with the requirements set forth in section 717. It is no coincidence that in case after case across the country plaintiffs who must comply with section 717 requirements face dismissal because an improper defendant has been named.[6] Petitioner cannot begin to enumerate all the cases in district courts that have been

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[6] Cooper v. United States Postal Service, 740 F.2d 714 (9th Cir. 1984), cert. denied, 105 S.Ct. 2034 (1985), McGuinness v. United States Postal Service, 744 F.2d 1318 (7th Cir. 1984), Newbold v. United States Postal Service, 614 F.2d 46 (5th Cir. 1980), cert. denied, 449 U.S. 878; reh'g.denied, 449 U.S. 1027 (1980), and Ellis v. United States Postal Service, 784 F.2d 835, 838 (7th Cir. 1986).

dismissed for failure to name the proper defendant.[7]

Although several circuits have recently ruled that the United States Postmaster General is the only proper defendant in employment discrimination actions under section 717 against the Postal Service, the "Right to Sue" letter, which is the only communication actually sent to aggrieved employees, is totally devoid of this basic information. As noted by one district court judge who was faced with this issue, "[t]he 'Right to Sue' EEOC letter, which gives complainants only thirty days in which to commence a suit, provides absolutely no help at all. In fact, in the underlying proceedings it is the agency which is named as the defendant and its name

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[7] Recitation of the exact number of cases dismissed is beyond the scope of traditional legal research in that, more often than not, cases are dismissed with no published opinion.

appears in the caption of the adverse decision." (App. D, infra). Petitioner urges this Court to promptly review this vital issue, upon which hinges the civil rights of every employee-plaintiff with an action against the United States Postal Service who must comply with section 717.

II.

CONFLICT BETWEEN THE CIRCUITS

A. The Jurisdictional Issue

The decision below that the thirty-day filing period in section 717 is jurisdictional conflicts with the decision of the Tenth Circuit in Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984), as well as with decisions of the Fourth, Fifth, Eleventh, and District of Columbia Circuits: Zografov v. V.A. Medical Center, 779 F.2d 967 (4th Cir. 1985); Sessions v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981), holding that

ninety-day time period in private employer actions under section 706(f) is not jurisdictional; Hendrix v. Memorial Hosp., 776 F.2d 1255 (5th Cir. 1985); Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982), Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982). On the other hand, the Ninth Circuit's different position is exemplified by Lofton v. Heckler, 781 F.2d 1390 (9th Cir. 1986), Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986), and Hymen v. Merit Systems Protection Board, 799 F.2d 1421 (9th Cir. 1986).[8] The Sixth Circuit in

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[8] But note a potential conflict within the Ninth Circuit as reflected in E.E.O.C. v. Nevada Resort Ass'n., 792 F.2d 882, 887 (9th Cir. 1986) and Ross v. United States Postal Service, 696 F.2d 720 (9th Cir. 1983) wherein the court held that requirements under section 2000e-5 are not jurisdictional, but may be excused by equitable doctrines such as waiver and estoppel. See also Gibbs v. Pierce County Law Enforcement Agency, City of Tacoma, 785 F.2d 1396, 1399 (9th Cir. 1986), which holds that filing requirement under sections 2000-e(5)(e) and 2000e-5(f) are not jurisdictional.

Rea v. Middendorf, 587 F.2d 4 (6th Cir. 1978) is consistent with that taken by the Seventh Circuit in Simms v. Heckler, 725 F.2d 1143 (7th Cir. 1984), and the Eighth Circuit in Scott v. St. Paul Postal Service, 720 F.2d 524 (8th Cir. 1984), cert. denied, 465 U.S. 1083 (1984).

The view of the Fifth, Tenth, Eleventh, and District of Columbia Circuits is best exemplified by the Tenth Circuit's decision in Martinez v. Orr, 738 F.2d 1107, which held that the thirty-day time limit of section 2000e-16(c) is not jurisdictional, but is, like a statute of limitations, subject to waiver, estoppel, and equitable tolling. In reaching this conclusion, the Tenth Circuit relied on the decision of the United States Supreme Court in Zipes v. Trans World Airlines, 455 U.S. 385 (1982), which held that the filing of a

timely charge with the Equal Employment Opportunity Commission is not jurisdictional but is subject to equitable tolling. Id., at 393. Neither the Sixth, Seventh, or Ninth Circuit decisions takes Zipes into account or reconciles this apparent conflict.

The result of these divergent interpretations of section 717's thirty-day requirement has been and continues to be a gross inequality of enforcement of Title VII in actions against the federal government. When a plaintiff brings an action initially naming an allegedly improper defendant in a circuit that interprets the thirty-day limit as jurisdictional, she will, on the basis of a procedural technicality, lose her opportunity to vindicate her civil rights. By contrast, her counterpart who files a complaint containing the same minor error in a circuit that permits equitable

tolling will be allowed to proceed to a determination on the merits of her claim. It is incumbent on this Court to provide a uniform interpretation of section 717(c) that will ensure that federal employees have access to the courts to vindicate their civil rights on an equal basis throughout the country.

This sharp conflict in the circuits has produced a significant disparity in the disposition of Title VII actions, depending solely on whether the Title VII plaintiff has brought her action within a circuit that views the thirty-day period as jurisdictional, or within a circuit where equitable tolling is recognized.[9]

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[9] See, for example, Allen v. Bolger, 597 F.Supp. 482 (D.Kan. 1984), a sex discrimination case where complainant, like Ms. Cooper, failed to name the Postmaster General in her original complaint. Unlike Ms. Cooper, however, the plaintiff in Allen was permitted to amend her complaint to name the proper defendant after the thirty day limitation period. See also Murray v. United States Postal Service, 569 F.Supp. 794 (D.C.N.Y. 1983).

The question presented here determines the continued viability or summary disposal on procedural technicalities of Title VII discrimination cases against the federal government. The question is of crucial importance to the hundreds of plaintiffs who now have Title VII cases against the federal government pending in the judicial system and to current and potential government employees who may in the future bring actions under this law. This Court should resolve the disagreement over the interpretation of this important federal statute.

B. The Rule 15(c) Relation Back Upon Actual Notice Issue

With respect to the fourth question presented, the Ninth Circuit's holding in this case that Rule 15(c) requires actual notice to a new defendant within the statutory time period conflicts[10] with

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10 Petitioner is mindful of this

the interpretations given that rule by the Second Circuit in Ingram v. Kumar,

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Court's recent decision in Schiavone v. Fortune, ___U.S._____, 106 S.Ct. 2379 (1986), but the instant case is distinguishable from Schiavone. Petitioner respectfully asserts that in her situation, unlike that of petitioners in Schiavone, the ascertainment of the proper defendant's identity was difficult, if not virtually impossible. Though petitioner Corbett's "Right to Sue" letter informs her that she should file an action in the appropriate district court within thirty days, it is conspicuously silent as to who the proper defendant is in such an action. Although the courts have determined that the head of the particular agency in his official capacity is the only proper defendant, the "Right to Sue" letter does not refer plaintiffs to the rules of procedure that govern the process. Nor does it indicate who is the proper defendant.

Unlike the situation in Schiavone, where the Court stated that "[t]his was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs," in petitioner's case, the identity of the proper defendant is simply not obvious. Moreover, petitioner's "Right to Sue" letter is from the Regional Postmaster General and in the underlying proceedings it is the agency that is named as the defendant. (See, Memorandum and Order, Tilghman v. United States Postal Service, No. C-86-3744, (App. H, infra).

In light of the extremely short statutory period (thirty days) which may or may not

585 F.2d 566 (2nd Cir. 1978), cert. denied, 440 U.S. 940 (1979), by the Fifth Circuit in Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980) and see Hendrix v. Memorial Hospital of Galveston County, 776 F.2d 1255 (5th Cir. 1985), by the Sixth Circuit in Ringrose v. Engelberg Huller Co., 692 F.2d 403 (6th Cir. 1982), and by the District of Columbia Circuit in Jarrell v. United States Postal Service, 753 F.2d 1088 (D.C. Cir. 1985).

The position of the Second, Fifth, and Sixth Circuits is best explicated by the Second Circuit's decision in Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978), cert. denied 440, U.S. 940 (1979). In its opinion, the court implies that in states where service of process must be

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be jurisdictional, depending on which circuit plaintiff brings her action, and the severity of sanctions for failing to comply with all statutory requirements in a timely fashion, countless federal employee-plaintiffs cannot vindicate

effected within the statute of limitations period, Rule 15(c)'s requirement that actual notice be received "within the period provided by law for commencement of the action" is properly construed as requiring notice on a substituted defendant within the statutory limitations period. However, notes the court, in many states and under the federal rules, timely service can be made on a defendant after the statute of limitations has run; it is only the filing of a complaint that must be completed before the statute runs. In these states, and in federal courts hearing federal question cases, "the period provided by law for commencing the action" includes a reasonable time following the expiration of the statute of limitations for service of process.[11] Consequently, the Second

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important civil rights.

[11] See Federal Rules of Civil Procedures, Rules 3 and 4(a).

Circuit view holds that in jurisdictions permitting post-statute of limitations service of process under Rule 15(c) the period within which "the party to be brought in" must receive notice of the action includes a reasonable time as allowed for service of process. Id., at 571-572.

The Ninth Circuit view adopted in the court below, which is also the view adhered to by the Fourth Circuit in Weisgal v. Smith, 744 F.2d 1277 (4th Cir. 1985), by the Seventh Circuit in Hughes v. United States, 701 F.2d 56 (7th Cir. 1982) and Stewart v. United States, 655 F.2d 741 (7th Cir. 1981), and by the Tenth Circuit in Watson v. Unipress,

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Presumably, in a diversity case, whether the "period provided by law for the commencement of the action" would include reasonable post-statute time for service of process would depend on whether, in the state where the court sat, the statute was tolled by filing of a complaint or by service of process, See, Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530 (1949).

Inc., 733 F.2d 1386 (10th Cir. 1984) (noting conflict between the circuits) interprets the phrase "the period provided by law for the commencement of the action" to mean only the statute of limitations period. It does not interpret that period to include a reasonable time for service of process, even in those jurisdictions that permit an initial defendant to be served after the statutory period has passed.

This conflict between the circuits results in unequal treatment not only of civil rights plaintiffs, but of litigants in all types of cases in federal court who initially sue the "wrong" defendant. This problem has arisen in hundreds of different factual contexts, and it will undoubtedly continue to do so. See C. Wright & A. Miller, Federal Practice and Procedure 1498 (Supp.); Note: Federal Rule of Civil Procedure 15(c): Relation

Back of Amendments, 57 Minn. L. Rev. 83 (1972). It is plainly inequitable and injurious to the effective administration of justice for the substitution of an initially misnamed defendant to relate back to the filing of the initial complaint in one circuit, thus saving a plaintiff's claims, when the exact same facts would lead to dismissal of plaintiff's case in another circuit. In addition to this unjust difference in treatment, the conflict between the circuits is creating substantial confusion and uncertainty in the district courts in circuits that have yet to rule on this issue. For both of these reasons, this Court should review the Ninth Circuit's decision and resolve the disagreement over the proper interpretation of Rule 15(c).

C. Section 504 of the Rehabilitation Act Protects Federal Victims of Employment Discrimination on the Basis of Physical Handicap

This Court should review the sharp conflict between circuit courts that has arisen over the application of section 504 of the Rehabilitation Act to federal employees. Although section 504 expressly prohibits discrimination on the basis of handicap by the Postal Service, the Ninth Circuit's holding in Boyd v. United States Postal Service, supra, 752 F.2d 410, specifically abrogates that statutory section. The Ninth Circuit predicates this holding on its view that Congress could not have intended to provide disabled individuals with two avenues of redress of employment discrimination.

At least two other circuit courts of appeals have ruled that section 504 does

apply to the United States Postal Service, and thus conflict with the Ninth Circuit's interpretation. (Morgan v. United States Postal Service, 798 F.2d 1162 (8th Cir. 1986), Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1982), de la Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986), and Smith v. United States Postal Service, 742 F.2d 257 (6th Cir. 1984). This Court should review these decisions and resolve the disagreement over the proper interpretation of the Rehabilitation Act.

III.

CONFLICT WITH APPLICABLE SUPREME COURT PRECEDENT

A. Baldwin County Welcome Center v. Brown

Review should also be granted because the decision below regarding the "jurisdictional" nature of section 717

failed to consider and conflicts with this Court's decision in Baldwin County Welcome Center v. Brown, 466 U.S.1475, (1984), reh'g denied, 104 S.Ct. 2691 (1984).

The Ninth Circuit Cooper decision is predicated on the assumption that the thirty-day filing requirement of section 717(c) is jurisdictional (App. A, infra). The Baldwin County case sharply undercuts that assumption, thus raising serious questions about the theoretical underpinning of Cooper.

In Baldwin County Welcome Center v. Brown, 466 U.S.147 (1984), reh'g denied, 104 S.Ct. 2691 (1984), this Court reviewed a decision of the Eleventh Circuit that had excused a Title VII plaintiff's failure to comply with the ninety-day filing period contained in section 706(f)(1) of the Act, 42 U.S.C. § 2000e-5(f)(1), which section applies to suits

against private employers. This Court did not hold that the section 706(f)(1) time limit was jurisdictional. Rather, it applied its prior conclusion in Zipes v. Trans World Airlines, 455 U.S. 385 (1982), reviewed the Eleventh Circuit's decision for facts that would justify the application of that doctrine, and reversed the decision of the Eleventh Circuit.

This Court's decision in Baldwin County is thus premised on the proposition that the ninety-day filing limit for private employee actions is not jurisdictional, but is, like a statute of limitations, subject to waiver, estoppel, and equitable tolling. See, Baldwin County Welcome Center v. Brown, supra, 466 U.S. 147 (1984), (Stevens, J., dissenting). Given that the Supreme Court views the section 706(f)(1) time limit for private actions as being subject to

equitable tolling, the Ninth Circuit in Cooper erred in holding that the filing limit for federal employee actions under section 717 is jurisdictional. The legislative history supporting the addition of section 717 to Title VII in 1972 makes clear that substantive procedural rules governing section 717 actions by federal employees should be congruent with rules applicable to private employee actions. See, HR. Rep. No. 1746, 92d Cong., 2d Sess. 103, reprinted in 1972 U.S. Code Cong. & Ad. News 2157-60. See also, Martinez v. Orr, 738 F.2d at 1110. The conflict between the decision rendered below and the Baldwin County Welcome Center decision requires that this Court promptly review the decision below to ensure uniformity with the Court's prior decisions.

B. Consolidated Rail Corp. v. Darrone

Review should also be granted because the decision below appears to conflict with § 504 of the Rehabilitation Act as interpreted by this Court's decision in Consolidated Rail Corp. v. Darrone, 465 U.S. 624, (1984).

In Consolidated Rail this Court, noting a conflict in the circuits, clarified the scope of the private right of action to enforce section 504 of the Rehabilitation Act. This Court reviewed a Third Circuit decision that held that an action for employment discrimination under section 504 was not limited to situations "where a primary objective of the federal financial assistance is to provide employment." Id., at 629. In addressing this question, the Court elaborated on the scope of Section 504 "[I]t is unquestionable that the section

[504] was intended to reach employment discrimination." Among its purposes are the promotion and expansion of employment opportunities in the public and private sectors for handicapped individuals and the placement of such individuals in employment. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

The Court in Darrone scrutinized the reasons Congress enacted sections 501 and 504 of the Rehabilitation Act that require all federal employers and federal contractors to adopt affirmative action programs for disabled persons. Consolidated Rail Corp. v. Darrone, supra, at 626, fn. 12. Congress realized that any advancement of vocational rehabilitation of handicapped individuals would be effectively deterred by pervasive employment discrimination in the workforce. "Employment discrimination thus would have 'a profound effect on the

provision of relevant and effective [rehabilitation services].'" 119 Cong.Rec. 5862 (1973) (remarks of Sen. Williams).

This Court's decision in Consolidated Rail is thus premised on the proposition that section 504 prohibits employment discrimination on the basis of physical handicap. Given this interpretation, the Ninth Circuit has erred in holding that section 504 is not available to Postal Service employees alleging physical handicap employment discrimination. It is clear from the face of the statute, the Act's legislative history, and the Consolidated Rail opinion that section 504 covers employment discrimination against the United States Postal Service. The conflict created by the Ninth Circuit's decision in Boyd, the Seventh Circuit's decision in McGuinness v. United States Postal Service, 744 F.2d

1318 (7th Cir. 1984), and the Eighth Circuit's decision in Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985) requires that this Court review the Boyd, McGuinness, and Gardner decisions in order to assure uniformity throughout the circuit courts on this most pressing issue.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel wish to gratefully acknowledge the assistance of JoAnne Frankfurt, Esq.,

Carol Moor, Ana Guzman, Robin Bishop and Brenda Thomas on the preparation of this brief.

(Appendices follow)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSA MARIA (MORENO) CORBETT, Plaintiff-Appellant, -vs- PAUL N. CARLIN, in his capacity as Postmaster General of the UNITED STATES POSTAL SERVICE, Defendant-Appellee.	No. 85-2829 D.C. No. CV 82-5980 AJZ MEMORANDUM

Appeal from the United States District Court for the Northern District of California
Alfonso J. Zirpoli, District Judge, Presiding
Argued and Submitted October 1, 1986
San Francisco, California

Before: WALLACE, NORRIS, and BRUNETTI, Circuit Judges.

After termination, Corbett complained to the Postal Service that she had

been discharged due to her physical handicap and national origin. The Postal Service denied the claim and advised her that she had a right to sue in the district court in 30 days. Her initial pleadings were based upon the due process and equal protection clauses of the fifth amendment and the Rehabilitation Act of 1973 (Act). However, after amending her claims, her resultant lawsuit was based solely on the Act. She appeals from a dismissal of her action, and we affirm.

Corbett's action pursuant to the Act must be brought against the Postmaster General. 29 U.S.C. § 2000e-16(a); Cooper v. United States Postal Service, 740 F.2d 714, 716 (9th Cir. 1984) (Cooper), cert. denied, 105 S.Ct. 2034 (1985). Corbett failed to name the Postmaster General as a defendant.

Corbett's untimely efforts to add the Postmaster General by amendment were

properly rejected by the district court. The 30-day filing period of section 2000e-16(a) is jurisdictional. Cooper, 740 F.2d at 716.

Rule 15(c) of the Federal Rules of Civil Procedure allows relation back by the addition of a new defendant only if the new defendant had actual notice before the limitation period expired. Cooper, 740 F.2d at 716. That notice requirement would be met here if the Postmaster General, the United States Attorney or the United States Attorney General were served with the original complaint within the 30-day period. See Rule 15(c). None were so served. Therefore, the amendment did not relate back and the district court did not have subject matter jurisdiction over the section 501 claim. Cooper, 740 F.2d at 717.

The attempt by Corbett to assert a claim pursuant to section 504 of the Act is equally unavailing. We have held "that section 501 is the exclusive remedy for discrimination in employment by the Postal Service on the basis of handicap." Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985).

AFFIRMED.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 21.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSA MARIA (MORENO) CORBETT, Plaintiff-Appellant, -vs- PAUL N. CARLIN, in his capacity as Postmaster General of the UNITED STATES POSTAL SERVICE, Defendant-Appellee.	No. 85-2829 D.C. No. CV 82-5980 AJZ ORDER

Appeal from the United States District Court for the Northern District of California

Before: WALLACE, NORRIS, and BRUNETTI, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROSA MARIA (MORENO) CORBETT, Plaintiff, -vs- PAUL N. CARLIN, in his capacity as Postmaster General of the UNITED STATES POSTAL SERVICE, Defendant.	No. C-82-5980 AJZ ORDER DENYING PLAINTIFFS' MOTION TO AMEND AND GRANTING DEFENDANTS' MOTION TO DISMISS

Plaintiff's motion for leave to amend to add a claim and defendants' motion to dismiss came on for hearing on September 9, 1985, the parties represented by counsel of record.

Plaintiff originally filed this action alleging violations of sections 501 and 504 of the Rehabilitation Act of

1973, 29 U.S.C. §§ 791, 794. On April 27, 1983, this court dismissed without prejudice plaintiff's section 504 claim. Plaintiff now seeks to amend her complaint to once again add a claim of employment discrimination on the basis of physical handicap under section 504.

The issue in determining whether to permit amendment is whether a private individual can bring suit against the Postal Service under section 504 for employment discrimination based on handicap. In Boyd v. United States Postal Service, 752 F.2d 410 (9th Cir. 1985), the Ninth Circuit answered this question in the negative and held that an employee of a federal agency could not bring suit under section 504 for employment discrimination on the basis of handicap. The court reasoned that "it is unlikely that Congress, having specifically addressed employment of the handicapped by

federal agencies (as distinct from employment by recipients, themselves nonfederal, of federal money) in section 501, would have done so again a few sections later in section 504." Id. at 413, quoting McGuinness v. United States Postal Service, 744 F.2d 1318, 1321 (7th Cir. 1984).

Plaintiff's attempts to distinguish Boyd are unpersuasive. Although Boyd involved the requirement of exhaustion of administrative remedies and this case involves the thirty day filing requirement, both plaintiffs attempted to avoid the procedural requirements of Title VII by alleging a cause of action under section 504. Furthermore, Consolidated Rail v. Darrone, __ U.S. __, 104 S.Ct. 1268 (1984), does not alter Boyd. Darrone did not authorize suits by handicapped employees against their employing agencies but rather clarified that the

recipient of federal aid may be sued even though the primary objective of the aid is not to promote employment.

Defendants' motion to dismiss is based on the recent Ninth Circuit decision in Cooper v. United States Postal Service, 740 F.2d 714 (9th Cir. 1984) cert. denied, __ U.S. __, 52 U.S.L.W. 3731 (U.S. Jan. 16, 1985) (No. 84-600). The court in Cooper made it clear that the Postmaster General is the only proper defendant for a section 501 action and must be served within the 30 day period specified under 42 U.S.C. §§ 20003-16(c). In this case plaintiff failed to serve the Postmaster General within 30 days of the Final Agency Decision and there are no circumstances indicating notice should be imputed to such unnamed defendant.

Accordingly,

IT IS ORDERED that plaintiff's motion to amend her complaint to add a claim under section 504 is denied with prejudice; and

IT IS FURTHER ORDERED that defendants' motion to dismiss is granted.

Dated: October 15, 1985

/s/
United States District Judge

APPENDIX D

UNITED STATES POSTAL SERVICE
Western Regional Office
San Bruno, CA 94099-0001

EEO# 5-1-0283-1
CERTIFIED #7529642
RETURN RECEIPT REQUESTED

Ms. Rose M. Moreno (Corbet)
1038 Plymouth Avenue
San Francisco, California 94112

Dear Ms. Moreno (Corbet):

Reference is made to your complaint of discrimination filed with the EEO Branch, U.S. Postal Service, Western Regional Headquarters, San Bruno, California on February 4, 1981.

The complaint was accepted and assigned for investigation on May 8, 1981. You were provided a copy of the investigative report on November 13, 1981 and an informal adjustment attempt was conducted in January, April and June of 1982. You were advised of the District Manager's proposed disposition of your complaint by letter dated August 10, 1982. The disposition letter specifically set forth time limits for appeal.

To this date, you have not responded. Therefore, in accordance with EEOC Regulations, I have adopted as the final agency decision the recommended finding of no discrimination as outlined in the August 10, 1982 notice of proposed disposition. Your case is now closed on the present record with a finding of no

physical handicap and national origin discrimination.

If you are dissatisfied with this final decision, you have the following appeal rights:

> You may appeal to the Equal Employment Opportunity Commission within 20 calendar days of receipt of the decision.
>
> Your appeal should be addressed to the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appeals and any representations in support thereof must be submitted in duplicate.
>
> The Equal Employment Opportunity Commission appeal time limit regulation under 29 CFR Part 1613 is: 1613.233 Time Limit: (a) Except as provided in paragraph (b) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For

purposes of this Part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorney's fees or costs is made, the decision will not be final until procedure is followed for determining the amount of the award as set forth in 1613.271(c).

(b) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

In lieu of an appeal to the Commission, you may file a civil action in an appropriate U.S. District Court within 30 days of receipt of the decision.

If you elect to appeal to the Commission's Office of Review and Appeals, you may file a civil action in a U.S. District Court within 30

days of receipt of the Commission's final decision.

A civil action may also be filed anytime after 180 days of the date of the initial appeal to the Commission, if a final decision has not been rendered.

Joseph R. Caraveo
Regional Postmaster General

cc: Felix Velarde-Munoz
(by Certified #7529773)
Employment Law Center
693 Mission Street, 7th Floor
San Francisco, CA 94105

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE ALFONSO J. ZIRPOLI,
SENIOR JUDGE

ROSA MARIA (MORENO) CORBETT,	No. C-82-5980 AJZ
PLAINTIFF,	SAN FRANCISCO, CA
-vs-	
WILLIAM BOLGER, IN HIS CAPACITY AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE,	SEPTEMBER 9, 1985
DEFENDANT.	

TRANSCRIPT OF PROCEEDINGS

A P P E A R A N C E S:

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ROBERT BARNES, ESQUIRE
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BY: STEPHEN A. SHEFLER

COURT REPORTER: RAYMOND LINKERMAN
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SAN FRANCISCO, CA 94102

MONDAY, SEPTEMBER 9, 1985

THE CLERK: CIVIL CASE 82-5980, CORBETT VS. BOLGER, MOTION TO DISMISS, MOTION TO FILE SECOND AMENDED COMPLAINT. COUNSEL PLEASE STATE THEIR APPEARANCES FOR THE RECORD.

MR. SHEFLER: STEPHEN SHEFLER FOR THE FEDERAL DEFENDANT, UNITED STATES POST OFFICE.

MS. SHIU: PATRICIA SHIU, COUNSEL FOR PLAINTIFF.

MR. BARNES: ROBERT BARNES, COUNSEL FOR PLAINTIFF.

THE COURT: WELL, I DON'T KNOW WHAT I'M GOING TO DO HERE. I'M BOUND BY THE

DECISION OF THE NINTH CIRCUIT IN THE COOPER CASE. I DON'T SEE ANY ALTERNATIVE FOR ME, VERY FRANKLY. IF THERE'S GOING TO BE A CHANGE, IT'LL HAVE TO BE THE COURT OF APPEALS FOR THE NINTH CIRCUIT THAT WILL HAVE TO MAKE IT. THE SUPREME COURT DENIED CERTIORARI IN COOPER, AND THEREFORE, I FIND COOPER IS CONTROLLING IN THIS CASE.

MS. SHIU: YOUR HONOR, MAY I SPEAK TO THAT?

THE COURT: YES.

MS. SHIU: THIS -- THE CASE TODAY IS BROUGHT UNDER THE REHABILITATION ACT. IT IS NOT A TITLE XII CASE. COOPER VS. UNITED STATES POSTAL SERVICE IS A SEX DISCRIMINATION CASE THAT WAS BROUGHT UNDER TITLE XII OF THE CIVIL RIGHTS ACT.

THE ANALYSIS THAT IS APPROPRIATE FOR A REHABILITATION CASE DEPENDS ON LOOKING AT THE ACTUAL ACT ITSELF, VERY IMPORTANT-LY THE 1978 AMENDMENTS TO THE REHAB ACT,

TO INTERPRET AND DECIDE WHICH PORTIONS, IF ANY, OF TITLE XII APPLY TO A REHAB CASE. I THINK ON THAT BASIS COOPER IS DISTINGUISHABLE AND IS NOT DISPOSITIVE OF THE ACTION.

THE COURT: WELL --

MS. SHIU: I WOULD ALSO --

COURT: I MEAN, I'M SORRY, BUT I DON'T SEE ANY ALTERNATIVE. COOPER MAKES IT CLEAR THAT THE ALTERNATIVE METHOD OF SERVICE ON THE UNITED STATES ATTORNEY AND/OR THE ATTORNEY GENERAL MUST OCCUR WITHIN THE APPLICABLE 30-DAY PERIOD. FINALLY, THE FACT THAT PLAINTIFF EFFECTED SERVICE ON THE NAMED DEFENDANTS WITHIN A REASONABLE PERIOD OF TIME AFTER FILING THE COMPLAINT IS OF LITTLE CONSEQUENCE, IN LIGHT OF THE COURT'S HOLDING IN COOPER THAT SERVICE MUST BE MADE UPON THE POST-MASTER GENERAL WITHIN THE 30-DAY PERIOD. I FIND NO ALTERNATIVE, UNDER THE CIRCUM-STANCES.

OKAY. SUBMIT AN ORDER ACCORDINGLY.

MR. SHEFLER: YES, YOUR HONOR.

THE COURT: I'M SORRY.

MS. SHIU: THANK YOU, YOU HONOR.

THE COURT: NOW, YOU'VE GOT THE OTHER QUESTION HERE.

MS. SHIU: YES.

THE COURT: AND THAT'S TO AMEND AND ADD A THIRD-PARTY DEFENDANT.

AGAIN I'M BOUND BY THE NINTH CIRCUIT. THE BOYD CASE COVERS IT, AND LEAVES ME NO ALTERNATIVE. IT'S UNFORTUNATE, BUT THAT'S -- THAT'S WAY IT IS.

MS. SHIU: YOUR HONOR, IF I MAY ADDRESS THE BOYD CASE.

THE COURT: YES.

MS. SHIU: IT'S MY INTERPRETATION OF BOYD THAT WHAT BOYD HOLDS IS THAT A PLAINTIFF CANNOT CIRCUMVENT EXHAUSTION OF THE ADMINISTRATIVE REMEDIES UNDER SECTION 501 BY TRYING TO FILE A SECTION 504 CLAIM. THERE IS NO PROBLEM WITH THE

EXHAUSTION OF ADMINISTRATIVE REMEDIES IN THIS CASE. TO THE EXTENT THAT THE NINTH CIRCUIT HOLDS THAT SECTION 501 IS THE ONLY ROUTE FOR -- IS THE ONLY CLAIM FOR A REHAB CASE, I WOULD SUBMIT TO YOUR HONOR THAT ON THE FACE OF THE STATUTE ITSELF, SECTION 504, THAT IT DOES PROVIDE REDRESS FOR DISCRIMINATION ON THE BASIS OF HANDICAP AGAINST THE UNITED STATES POSTAL SERVICE. AND THAT, IN CONJUNCTION WITH THE DARRONE DECISION, MAKE IT QUITE CLEAR THAT PLAINTIFF HAS A CLAIM UNDER SECTION 504 FOR EMPLOYMENT DISCRIMINATION.

MR. SHEFLER: YOUR HONOR, IF I COULD JUST READ ONE SENTENCE FROM THE BOYD DECISION. IT SAID:

> "WE, THEREFORE, HOLD, AS DID THE SEVENTH CIRCUIT IN MC GUINNESS, THAT SECTION 501 IS THE EXCLUSIVE REMEDY FOR DISCRIMINATION IN EMPLOYMENT BY THE POSTAL SERVICE ON THE BASIS OF HANDICAP."

THAT'S THE BOTTOM LINE, THAT'S THE RULING, IT'S DISPOSITIVE.

MS. SHIU: THEY ALSO -- THAT CASE -- THAT COURT ALSO CITES PRUITT FAVORABLY, AND UNDER PRUITT, THERE IS NO QUESTION THAT THERE IS CLAIMS UNDER BOTH SECTION 501 AND SECTION 504. NOR DOES THE COURT IN BOYD CITE ANY LEGISLATIVE HISTORY TO COME TO THEIR CONCLUSION THAT THEY, THEY DO NOT UNDERSTAND WHY CONGRESS WOULD ENACT SECTION 504, BUT CLEARLY IT DID.

THE COURT: WELL, AGAIN I FIND THAT IN BOYD, THE NINTH CIRCUIT MADE IT CLEAR THAT AN EMPLOYEE OF A FEDERAL AGENCY COULD NOT BRING A SUIT UNDER 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. SECTION 794, FOR EMPLOYMENT DISCRIMINATION ON THE BASIS OF A HANDICAP. THUS, PLAINTIFF'S MOTION TO AMEND HER -- AND ADD A CLAIM FOR EMPLOYMENT DISCRIMINATION OF THE BASIS OF PHYSICAL HANDICAP UNDER SECTION 504 MUST BE DENIED.

EVEN IF THIS COURT WERE TO FIND THAT PLAINTIFF COULD BRING THE ACTION FOR EMPLOYMENT DISCRIMINATION BASED ON HANDICAP AGAINST THE POSTAL SERVICE, PURSUANT TO SECTION 504 OF THE REHABILITATION ACT OF 1973, PLAINTIFF MUST STILL SATISFY THE REQUIREMENTS OF SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964. TWO OF THESE REQUIREMENTS ARE THAT THE ACTION BE BROUGHT WITHIN THIRTY DAYS OF THE RECEIPT OF THE FINAL AGENCY DECISION, AND THAT THE POSTMASTER GENERAL BE NAMED AS THE SOLE PARTY DEFENDANT. AS THE PLAINTIFF HAS BEEN UNABLE TO SATISFY THESE TWO REQUIREMENTS, THE COURT IS WITHOUT JURISDICTION TO HEAR THE CASE, AND THE CASE ACCORDINGLY MUST BE DISMISSED.

YOU'LL HAVE TO PREPARE AN ORDER ACCORDINGLY.

MR. SHEFLER: I SHALL, YOUR HONOR.

MS. SHIU: THANK YOU, YOUR HONOR.

(PROCEEDINGS ADJOURNED.)

CERTIFICATE OF REPORTER

I, RAYMOND LINKERMAN, THE UNDERSIGNED OFFICIAL REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 5 INCLUSIVE, CONSTITUTE A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

/s/
RAYMOND L. LINKERMAN

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

KAREN A. COOPER v. UNITED STATES POSTAL SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-600. Decided April 15, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In December 1980, petitioner filed an administrative complaint with respondent, her employer, alleging that she had been denied a position because of her sex. The Regional Postmaster General denied the complaint, notifying petitioner that she could appeal to the Equal Employment Opportunity Commission within 20 days, or file suit in federal district court within 30. See 42 U. S. C. § 2000e-16(c). Choosing the latter route, petitioner filed this suit on October 29, 1982, the day before the 30-limit expired. She did not serve copies of the complaint on the United States Attorney or the Attorney General until January 1983, and did not serve the Postmaster General until February. The record does not indicate when or if the Postal Service, which was the named defendant, was served, but it was not within the 30-day period.

The District Court dismissed the complaint because it did not name the proper defendant, who was the Postmaster General. § 2000e-16(c). Petitioner sought to correct this defect and have the amendment relate back to the date of the initial complaint. See Fed. Rule Civ. Proc. 15(c).[1] The

[1] That rule provides:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the

District Court denied the motion on the ground that the Postmaster General had not had notice of the suit within the 30-day period.

On appeal, a panel of the Ninth Circuit agreed that the Postmaster General was the only proper defendant and that the 30-day period was a bar—parenthetically, a jurisdictional—requirement. Therefore, petitioner's action was necessarily time-barred unless the amendment could relate back to the date of the original complaint. Observing that "[t]here is no unanimity among the circuits concerning the proper interpretation of rule 15(c)'s notice provision," the court adopted a strict, literal reading and affirmed.

The case raises two important issues. The first is whether the 30-day limit of § 2000e–16 (c) is jurisdictional or, like the equivalent limitation for suits against private employers, see *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), subject to waiver, estoppel, and equitable tolling. I have previously noted my dissent from the Court's refusal to address this issue, which has divided the Courts of Appeals. See *Stuckett* v. *United States Postal Service*, —— U. S. —— (1984) (WHITE, J., joined by REHNQUIST, J., dissenting from denial of certiorari). In light of the Court of Appeals' firm stance on the 30-day requirement and its view that petitioner's claim "must be barred" unless the amendment related back, I believe the issue is presented here. I continue to think it merits our attention.

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institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

The petition also challenges the Ninth Circuit's strict reading of Rule 15(c).[2] As that court observed, the Courts of Appeals have not taken a consistent approach to this provision. Some have rejected a literal construction of the requirement that the added party have had notice of institution of the action within "the period provided by law for commencing the action against him," allowing, for example, a reasonable time thereafter for service of process. See *Hart v. Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram v. Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); see also *Ringrose v. Engelberg Huller Co.*, 682 F. 2d 403, 410 (CA6 1982) (Jones, J., concurring). The argument in favor of such a grace period for service of process is appealing when the statute of limitations is as short as 30 days. On the other hand, the Ninth Circuit is hardly alone in requiring that the added defendant have had notice timely within the limitations period. See, *e. g.*, *Watson v. Unipress, Inc.*, 782 F. 2d 1086, 1090 (CA10 1984) (explicitly rejecting *Ingram*, *supra*); *Trace X Chemical, Inc. v. Gulf Oil Chemical Co.*, 724 F. 2d 1397, 1400–1401 (CA8 1983); *Hughes v. United States*, 701 F. 2d 56, 58–59 (CA7 1981).

Relying on the implications of the rule's second paragraph, respondent argues that except as provided therein, actual notice is always required against a federal defendant. It points out that the cases with which the decision below conflicts did not involve federal defendants. This effort to separate federal from private defendants may or may not be legitimate, but neither the court below nor any other cited decision relied on the identity of the added defendant in denying relation back. Moreover, this argument goes more to the question of when the added defendant may be deemed to

[2] The two questions presented are not unrelated. For example, were the 30-day period jurisdictional, the question would arise whether a district court would even have the power, notwithstanding the authorization of Rule 15(c), to add a new defendant after 30 days. See generally *Canavan v. Beneficial Finance Corp.*, 553 F. 2d 360, 364–365 (CA3 1977).

have had notice,[1] rather than the question, raised be petitioner, whether the period within which notice is required may be viewed flexibly.

In light of the conflicts in the lower courts on both issues raised by this petition, I would grant certiorari and set the case for oral argument.

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[1] In some cases, as where a complaint naming a corporation as the defendant is later amended to add the corporation's owner, *e. g., Itel Capital Corp.* v. *Cups Coal Co.*, 707 F. 2d 1253, 1253 (CA11 1983), or parent corporation, *e. g., Marks* v. *Prantco, Inc.*, 607 F. 2d 1153 (CA5 1979), the added party is deemed to have had notice in light of its identity of interests or close association with the original defendant. See generally *Hernandez Jimenez* v. *Calero Toledo*, 604 F. 2d 99, 102–103 (CA1 1979). Petitioner's position is somewhat weak in this regard because, while the complaint was filed within the requisite 30 days, no party was served with process within that period.

APPENDIX G

United States District Court
Northern District of California
San Francisco, California 94102

December 2, 1986

Chambers of
Marilyn Hall Patel
United States District Judge

Clarence Thomas
Chairman
Equal Employment Opportunity
Commission
Washington, D.C. 20507

Dear Mr. Thomas:

In the past two months, this court has heard the government's motions to dismiss complaints in two separate appeals from EEOC denials. Birden v. United States Postal Service, C-86-2223-MHP; Tilghman v. United States Postal Service, C-86-3744-MHP. In both cases, plaintiffs failed to name the proper defendant. This frequency has called to this court's attention the grave problem of the notorious lack of information provided to EEOC complainants.

Congress has seen fit to provide a judicial remedy to people who feel they have been discriminately against on the basis of their race, color, religion, sex, or national Clarence

origin. Once a complainant has exhausted his appeals through the administrative branch, he is entitled to seek his remedy in the courts but he has only thirty days in which to do so. Section 2000e-16(c) provides that the head of the department or agency is the appropriate defendant in Title VII civil actions. The courts have determined that the head of the particular agency in his official capacity is the only proper defendant. However, the "Right to Sue" letter withholds that information. It does not indicate who is the proper defendant, nor does it refer plaintiffs to the rules of procedure which govern service of process. It only states that they may file a civil action in the appropriate federal district court and that it must be filed within thirty days. The Ninth Circuit has strictly construed the thirty day statute of limitations and does not allow subsequent amendments naming the proper party to relate back to the original filing of the complaint. Lofton v. Heckler, 781 F.2d 1390 (9th Cir. 1986); Cooper v. United States Postal Service, 740 F.2d 714 (9th Cir. 1984). Therefore, given the extremely short statutory period, and the severity of the sanctions for failing to comply with all the statutory requirements in a timely fashion, potential litigants, many of whom appear pro se, are effectively denied their judicial remedy.

I would hope that this agency would take it upon themselves to modify the "Right to Sue" letter to provide enough information that earnest people may avail themselves of the remedy which has been guaranteed to them by the legislative branch.

Respectfully,

/s/
MARILYN HALL PATEL

APPENDIX H

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LLOYD E. TILGHMAN, Plaintiff, v. UNITED STATES POSTAL SERVICE, Defendant.	NO. C-86-3744 MHP MEMORANDUM AND ORDER

Plaintiff, Lloyd Tilghman, filed a complaint claiming that defendant, the United States Postal Service, discriminatorily denied him promotion because of his age, race, and because he is "outspoken". The parties are presently before this court on the government's motion to dismiss the complaint. The government contends that because plaintiff did not name or give notice to the only proper defendant, the Postmaster

General, within the statutory thirty day period, the court is without jurisdiction. Further, they contend that because plaintiff invoked the court's jurisdiction only under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, the court lacks jurisdiction over the claims of discrimination for outspokenness and age. Finally, they move to dismiss the claims based on plaintiff's failure to be promoted in 1978, 1981 and 1984 because plaintiff did not exhaust his administrative remedies as to those claims.

For the reasons stated below, defendant's motion is granted in part, denied in part, and continued in part to give plaintiff the opportunity to file the appropriate amendments and defendant the opportunity to file the appropriate declarations.

BACKGROUND

Plaintiff, Lloyd Tilghmam is over 60 years old, black, and is retired from the United States Postal Service, He applied for promotion and was interviewed on June 16, 1978, September 14, 1981, December 16, 1981, March 17, 1982, and April 19, 1984. Complaint at 3. Plaintiff filed a complaint in 1980 which was settled on June 30, 1982. Complaint at 2. He now claims defendant is in breach of that settlement. Id.

Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on September 13, 1984. It was denied on June 4, 1986 because it was not timely filed. Plaintiff received notice of the denial on June 13, 1984. Id. at 3. On July 7, 1986 plaintiff filed the current action. He named only the United States Postal Service as defendant. The summons and complaint were served on a

clerk at the Evans Street branch of the United States Post Office on July 10, 1986. Decl. of Appleton. They were forwarded to Nancy Hutt at the Office of Field Legal Services/Labor Law in San Bruno, California, some time prior to July 28, 1986. Decl. of Donly. Nancy Hutt sent a copy of the summons and complaint to the United States Attorney's Office where a file was opened on August 6, 1986. Id. Plaintiff served the United States Attorney's Office on August 8, 1986. Id.

DISCUSSION

A. Timeliness

The primary issue for this court is whether the proper defendant received actual notice of the complaint within the statutory period so that an amendment to name the proper party may relate back to

the filing within the statutory period. Fed. R. Civ. P. 15(c).

Under 42 U.S.C. § 2000e-16(c), plaintiff had thirty days within which to file his complaint. The relevant portion of the statute provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . an employee . . . may file a civil action . . . in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

The Ninth Circuit has made it clear that the proper defendant in a Title VII action in the head of the agency in his official capacity, not the agency itself. White v. General Services Administration, 652 F.2d 913, 916 n.4 (9th Cir. 1981).

However, this case involves not only the naming of the improper party, but the application of Rule 15(c) and whether service of process was effective. In this regard the government argues that

Reynolds v. United States, 782 F.2d 837 (9th Cir. 1986), is controlling. In that Title VII case against the United States, the court held that service on an Army sergeant did not satisfy the jurisdictional requirement of Fed. R. Civ. P. 4(d) subsection (4), if serving the United States, and subsection (5) if serving an officer of the United States. However, in Reynolds, the plaintiff did name the proper defendant; he simply failed to properly serve that defendant within 120 days. In this case, plaintiff failed to name the Postmaster General.

39 C.F.R. § 2.2 (1986) provides that "[t]he General Counsel of the Postal Service shall act as agent for the receipt of legal process against the Postal Service . . . and all other officers and employees of the Postal Service to the extent that the process arises out of

[their] official functions...." In addition, under 39 U.S.C. § 409, service for claims brought against the Postal Service pursuant to Title 28 must be accomplished in the same manner as suits against other federal officers or agencies. Rule 4(d) requires that the United States Attorney in the district where the action is brought be personally served or served with the summons and complaint by registered mail. Service upon the Assistant United States Attorney did not occur until August 8, 1986, fifty-six days after plaintiff received his final decision from the EEOC. The only service within the statutory period was on a personnel clerk at the Evans Street Post Office.

The only way plaintiff's complaint can survive is if the proper defendant actually received notice by July 13,

1986. Rule 15(c) governs the relation-back of subsequent amendments to the filing of the complaint.[1]

Defendant relies upon three cases as controlling. Schiavone v. Fortune, __ U.S.___, 106 S.Ct. 2379 (1986); Lofton v. Heckler, 781 F.2d 1390 (9th Cir. 1986); Cooper v. United States Postal Service, 740 F.2d 714 (9th Cir. 1984), cert. denied, __ U.S. __, 105 S.Ct. 2034 (1985). Cooper involved a Title VII plaintiff who filed a complaint in the district court twenty-nine days after receiving notice of the final EEOC decision. As in the instant case, Cooper named only the United States Postal Service. Unlike, the instant case, Cooper served no one during the thirty-day period. Adhering to a "literal interpretation of Rule 15(c)'s notice," the Ninth Circuit upheld the district court's denial of Cooper's motion to

subsequent dismissal fo the complaint. Cooper v. United States Postal Service, 740 F.2d at 716.

Lofton involved a pro se litigant who filed a petition for review of his Title VII action within the statutory period. However, Lofton named only the Department of Health and Human Services, not Margaret Heckler. Again, the Ninth Circuit upheld the dismissal of the complaint for failure to name the proper defendant and effect proper service within thirty days.

The Supreme Court granted certiorari in Schiavone because of the split among the circuits in interpreting Rule 15(c). Schiavone v. Fortune, ___ U.S. at __, 106 S.Ct. at 2381. Petitioners filed a libel suit against Fortune, which was not a proper defendant because it was only a trademark and a division of Time, Inc. The complaint was filed within the one

year statute of limitations, but neither Fortune nor Time was served within that period. Although petitioners argued that barring their claim would set up a "procedural double standard," the Court upheld strict construction of the rule.[2] The Court stated that the "linchpin is notice, and notice within the limitations period." Id. at ___, 106 S.Ct. at 2385.

In all three cases, none of the proper defendants were on notice within the period of limitations that there was a claim filed against them. In Schiavone, the Court suggests that the outcome might have been different if the the party to be brought in had received notice and would not be prejudiced in maintaining its defense. Id. at ___, 106 S.Ct. 2385-86 n.8. While Rule 4(d)(4) and (5) require service by certified or registered mail, the notice required by

Rule 15(c) specifies only delivery or mailing of process.

In the instant case, there have not yet been presented to the court enough facts to determine whether the Postmaster General had actual notice of the litigation. There is a direct relationship between Nancy Hutt and the Postmaster General, and Nancy Hutt may have received notice within the thirty day period. 39 C.F.R. § 224.6 describes the organization of the Law Department of the Postal Service. Subsection (a) provides that the head of the department is the General Counsel, and subsection (b) describes the department's duties. In addition to acting as agent for service of process, the General Counsel "serves as legal advisor," represents the Postal Service in "judicial proceedings," manages field programs and "operates directly the field program in the area of labor relations

law." 39 C.F.R. 224.6 (b)(1),(6). It is undisputed that Nancy Hutt had the complaint and summons by July 28, 1986, because she mailed it on that date to Judith Whetstine, Assistant United States Attorney, along with a copy of the Order Setting Conference. Decl. of Donley, Exh. B. Therefore, at least by July 28, 1986, the Postmaster General's "attorney", the Law Department, had already begun preparing its defense. If notice had been received before July 13, 1986, there is sufficient evidence to show that defendant is not likely to be prejudiced if the court allowes the suit to go forward.

In addition to the possibility of actual notice, the instant case is distinguishable from Schiavone in another way. In reaching its result, the Court considered the equities. "We cannot understand why, in litigation of this

asserted magnitude, Time was not named specifically as the defendant . . . ." Id. at ___, 106 S.Ct. at 2383. They further noted that "[t]his was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs." Id. On the other hand, in Title VII cases, it is not obvious who is the proper defendant. The brief "Right To Sue" EEOC letter, which gives complainants only thirty days in which to commence a suit, provides absolutely no help at all. In fact, in the underlying proceedings it is the agency which is named as the defendant and its name appears in the caption of the adverse decision.

The government is ordered to provide declarations stating who actually received plaintiff's complaint at the Evans Street Post Office, when and by whom it was forwarded to the Law Department, when

and by whom it was received in San Bruno, and any other details evidencing when the Postmaster General's agent for service of process first received notice of this litigation. These declarations are to be filed with this court by December 22, 1986. Plaintiff must amend his complaint within ten days of the date of this hearing to properly name the Postmaster General. This court will then make a determination whether the proper party had actual notice and plaintiff's amendment may relate back to the July 7, 1986 filing of the complaint.

B. Exhaustion of Administrative Remedies

The government correctly argues that plaintiff has not exhausted his administrative remedies as to the failure to be promoted in 1978, 1981, and 1984 because only the March 1982 interview was discussed in the EEOC decision. Brown v.

General Services Administration, 425 U.S. 820 (1976). Therefore, claims of discrimination in all years other than 1982 are hereby dismissed for lack of jurisdiction.

C. Jurisdiction Over Other Claims

The government also correctly states that the court lacks jurisdiction to hear a claim for discrimination based on outspokenness because Title VII only applies to discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. 2000e-16(a). Even if the plaintiff could, clearly, he has not made a separate claim under the First Amendment of the United States Constitution. Therefore, plaintiff's claim for discrimination on the basis of outspokenness is also dismissed for lack of jurisdiction.

The government contends that, while plaintiff claims age discrimination, he has not invoked the court's jurisdiction under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. ("Title 29"), and therefore his age discrimination claim should be dismissed. However, the EEOC letter, which was attached to and incorporated in the complaint as Exhibit A, specifically stated that plaintiff's claim of age discrimination was brought under both Title VII and Title 29. Therefore, plaintiff is hereby granted ten days in which to further amend his complaint to properly invoke jurisdiction under Title 29.

D. Post-Hearing Submission

On November 26, 1986 plaintiff filed an amended complaint. Unfortunately it still does not conform to the court's

bench order. Although plaintiff still alleges age discrimination in the body of the complaint, he fails to state the jurisdictional predicate for the claim as required by Fed. R. Civ. P. 8(a). He also continues to allege discriminatory conduct for years other than 1982. In light of the instructions given in this order perhaps plaintiff can properly amend. Accordingly, he is given ten days from the date of this order to correct his complaint by the filing of a second amended complaint.

IT IS SO ORDERED.

DATED: Dec. 18, 1986

/s/
MARILYN HALL PATEL
United States District
Judge

FOOTNOTES

1. Whenever a claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original pleading. An amendment changing the party against whom a claim is asserted, relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

2. The "double standard" results when plantiffs are barred from giving late notice to a new defendant when late notice to the original defendant would be timely under Fed. R. Civ. P. 4(j).

No. 86-1464

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROSA M. CORBETT, PETITIONER

v.

PRESTON R. TISCH, IN HIS CAPACITY AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

JEFFRICA J. JENKINS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a handicapped person may bring a claim of employment discrimination against the United States Postal Service under either Section 501 or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 791, 794, without meeting the requirements of Section 717(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), that an action be filed within 30 days of the plaintiff's receipt of notice of final agency action and that the action name the Postmaster General as the defendant.

2. Whether the court of appeals correctly held that petitioner's attempt to amend her complaint five months after it was filed in order to name the proper federal defendant did not relate back to the date on which the complaint was filed, because petitioner had failed to satisfy the requirements of Fed. R. Civ. P. 15(c) for relation back in situations in which a plaintiff fails to name the proper federal officer as the defendant.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1464

ROSA M. CORBETT, PETITIONER

v.

PRESTON R. TISCH, IN HIS CAPACITY AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A4) and of the district court (Pet. App. C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1986. A petition for rehearing with suggestion for rehearing en banc was denied on January 7, 1987 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on March 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1981, petitioner filed an administrative complaint with the Western Regional Headquarters of the United States Postal Service (USPS) alleging that she had been terminated from her position as a distribution clerk because of her physical handicap, in violation of Sections 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. (& Supp. III) 791, 794.[1] On September 29, 1982, petitioner received a letter from the Regional Postmaster General informing her of the final agency decision finding no discrimination (Pet. App. D1) and further informing her that she either could appeal this decision to the Equal Employment Opportunity Commission within 20 days or, in lieu of such an appeal, could file a civil action in the appropriate district court within 30 days of her receipt of the decision (*id.* at D2-D3).

On October 29, 1982, exactly 30 days after her receipt of notice of the final agency decision, petitioner through counsel filed a complaint in the United States District Court for the Northern District of California. She again alleged (among other things) that her termination was in violation of Sections 501 and 504 of the Rehabilitation Act, and named the Postmaster of the Post Office of Oakland, California, the Director of Mail Processing of that office, and the USPS as defendants. Petitioner, however, failed to name the Postmaster General as a defendant. She served a copy of the complaint on the United States Attorney on November 18, 1982, and served the other named defendants on November 24, 1982.

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[1] Petitioner also originally raised claims of employment discrimination on the basis of national origin and claimed violations of the Constitution as well as the Rehabilitation Act, but she is no longer pursuing those claims.

On March 23, 1983, the government moved to dismiss the complaint. The government argued that Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, applies to this action [2] and that the district court lacked subject-matter jurisdiction because petitioner had failed to name the only proper defendant under Section 717(c) of Title VII (42 U.S.C. 2000e-16(c)), the Postmaster General.[3] The government also argued that petitioner's Section 504 claim must in any event be dismissed because the only basis for a claim of handicap discrimination in federal employment is Section 501 of the Rehabilitation Act.

On March 28, 1983, petitioner moved for leave to amend her complaint to substitute the Postmaster General as the defendant. The government opposed the motion, arguing that the requirements of Fed. R. Civ. P. 15(c) for an amended complaint to relate

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[2] Section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. 794a(a)(1), provides in pertinent part that "[t]he remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) * * * shall be available with respect to any complaint under section 791 of this title [*i.e.*, Section 501 of the Rehabilitation Act]." As discussed below, it is the government's position (and the unanimous view of the courts of appeals) that the procedures of Title VII are applicable to any cause of action for handicap discrimination in federal employment, including one purporting to be brought under Section 504 of the Rehabilitation Act.

[3] Section 717(c) requires that an action be brought against "the head of the department, agency, or unit, as appropriate." As petitioner's argument implicitly acknowledges (Pet. 20-21, 33 n.5, 39-40 & n.6), Section 717(c) has uniformly been interpreted to make the Postmaster General the only appropriate defendant in an action alleging employment discrimination by the USPS.

back were not met because petitioner had not served any governmental entity with a copy of the complaint within the 30-day statutory period for commencing her suit.[4] In an order dated April 27, 1983, the district court dismissed petitioner's Section 504 claim without prejudice but permitted petitioner to amend her complaint to name the Postmaster General as the sole defendant.

On November 9, 1984, the Postmaster General moved to dismiss for failure properly to name the correct defendant, relying on the Ninth Circuit's then-recent decision in *Cooper* v. *USPS*, 740 F.2d 714 (1984), cert. denied, 471 U.S. 1022 (1985), a Title VII case in which, as in this case, the plaintiff had named the USPS in a timely complaint but had not named the Postmaster General or served any federal representative within the 30-day statutory period. Petitioner opposed this motion, and the district court granted her request to stay the action pending this Court's action on a petition for a writ of certiorari in *Cooper*. Following this Court's denial of that petition on April 15, 1985, the government renewed its motion to dismiss. Petitioner then sought leave to amend her complaint to add the Section 504 claim and the three individual defendants previously dismissed by the district court.

On October 15, 1985, the district court denied leave to amend the complaint and granted the motion to dismiss. The court followed the Ninth Circuit's decision in *Boyd* v. *USPS*, 752 F.2d 410, 413 (1985), holding that Section 501 of the Rehabilitation Act

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[4] Section 717(c) of Title VII provides for suit "[w]ithin thirty days of receipt of notice of final action taken by a department, agency, or unit."

is the exclusive remedy for discrimination in employment by the USPS on the basis of handicap (Pet. App. C2-C3). In addition, the district court concluded that "*Cooper* made it clear that the Postmaster General is the only proper defendant for a section 501 action and must be served within the 30 day period specified under 42 U.S.C. § 2000e-16(c)" (Pet. App. C4).

2. The court of appeals affirmed in a brief per curiam memorandum (Pet. App. A1-A4). In reliance on its decision in *Cooper*, the court first stated that petitioner's action under the Rehabilitation Act was required to have been brought against the Postmaster General (*id.* at A2). Next, the court pointed out that petitioner had failed to name the proper defendant and that her "untimely efforts to add the Postmaster General by amendment were properly rejected by the district court" (*id.* at A2-A3).[5] The court of appeals explained that the amendment did not relate back under Fed. R. Civ. P. 15(c) because the Rule's requirement of timely notice to a federal defendant would be met only "if the Postmaster General, the United States Attorney, or the United States Attorney General were served with the original complaint within the 30-day period * * * [but] [n]one were so served" (Pet. App. A3). Finally, the court held that, under its previous decision in *Boyd*, Section 501 of the Rehabilitation Act is the exclusive remedy against the USPS for a claim of employment discrimination on the basis of physical handicap (Pet. App. A4).

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[5] The court stated that "[t]he 30-day filing period of section 2000e-16(a) [*sic*] is jurisdictional" (Pet. App. A3). The court did not indicate what relevance, if any, that proposition had to its analysis.

ARGUMENT

The decision of the court of appeals is correct and does not merit further review by this Court.

1. Petitioner contends (Pet. 16-17, 22-28, 53-54, 58-61) that the Court should grant certiorari to determine whether there is a cause of action under Section 504 of the Rehabilitation Act for handicap discrimination in federal employment.[6] She correctly notes that the courts of appeals are divided on that question. Some, observing that Section 501 directly addresses discrimination in federal employment whereas Section 504 addresses discrimination under federally funded or conducted programs or activities, hold that Section 501 is the exclusive remedy in federal employment cases.[7] The Fifth, Sixth, and Eighth Circuits, however, hold that such cases may be brought under both Section 501 and Section 504.[8]

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[6] Section 504 prohibits discrimination on the basis of handicap "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

[7] See, *e.g.*, *Boyd*, 752 F.2d at 413; *McGuinness* v. *USPS*, 744 F.2d 1318, 1321 (7th Cir. 1984) (suggesting without deciding that Section 504 "is inapplicable to federal employment"). These courts have recognized this Court's decision in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), that Section 504 reaches employment discrimination by recipients of federal funds, but have declined to extend that holding to employment discrimination by the federal government itself in light of the remedy Congress already provided in Section 501. Petitioner's claim (Pet. 58-61) that the decision below conflicts directly with *Darrone* is therefore incorrect.

[8] See, *e.g.*, *Morgan* v. *USPS*, 798 F.2d 1162, 1164 n.2 (8th Cir. 1986), cert. denied, No. 86-5979 (Mar. 30, 1987); *Smith* v. *USPS*, 742 F.2d 257, 260 (6th Cir. 1984); *Prewitt* v. *USPS*, 662 F.2d 292, 304 (5th Cir. 1981) (*Prewitt I*).

There is no need for this Court to resolve that split in the circuits, however, for "it is not even clear that there is a practical difference between the two views, * * * [and] it [is] a matter of merely technical interest whether both statutes, or only [Section 501], create a remedy for federal employment discrimination against the handicapped" (*McGuinness*, 744 F.2d at 1321-1322; see also *Boyd*, 752 F.2d at 414 ("makes little practical difference")). Those plaintiffs who try to bring an action under Section 504, despite having available an action under Section 501, do so (as petitioner did) in order to attempt to escape the procedural requirements of Title VII. These efforts have been uniformly unavailing, however, because *all* circuits that have addressed the question have agreed that a Section 504 action for discrimination in federal employment, if it exists, must be brought under the procedures of Title VII. *Morgan*, 798 F.2d at 1164-1165; *Gardner* v. *Morris*, 752 F.2d 1271, 1279 n.7 (8th Cir. 1985); *Boyd*, 752 F.2d at 413; *McGuinness*, 744 F.2d at 1321-1322; *Smith*, 742 F.2d at 262; *Prewitt I*, 662 F.2d at 304; *Prewitt* v. *USPS*, 662 F.2d 311, 314 (5th Cir. 1981) (*Prewitt II*).[9]

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[9] Petitioner argues (Pet. 17-19, 28-33) that these decisions are incorrect and that, indeed, she should not have been required to follow the procedures of Title VII even with respect to her claim under Section 501. For reasons stated at pages 3-6 of our brief in opposition in *Morgan*, a copy of which we are serving on petitioner's counsel, this Court should not review the unanimous holding of the courts of appeals that a Section 504 action for discrimination in federal employment, if it exists at all, is subject to the procedures of Title VII. As we noted in that brief, the unanimous rule of the courts of appeals is supported by, among other things, this Court's decisions in *Brown* v. *GSA*, 425 U.S. 820, 833 (1976) ("It would require the suspension of disbelief to ascribe to Con-

Although these cases have primarily addressed the requirement of Title VII that administrative remedies be exhausted, there is every reason to believe that they apply to the other procedural requirements of Section 717 as well. See, *e.g.*, *Morgan*, 798 F.2d at 1165 n.3 (applying Section 717 requirement that Postmaster General be the named defendant); *McGuinness*, 744 F.2d at 1322-1323 (same); *Prewitt I*, 662 F.2d at 304 (action against federal government under Section 504 is "subject to the same procedural constraints (administrative exhaustion, etc.)" as a Section 501 action); *Prewitt II*, 662 F.2d at 314; S. Rep. 95-890, 95th Cong., 2d Sess. 18-19 (1978) (emphasis added) (Congress intended to make the federal government responsive to employment discrimination claims by the handicapped in the "same" manner as it was responsive to claims by other minorities, "subject, of course, to the provision for exhaustion of administrative remedies *and other rules and procedures* set forth in Title VII").

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gress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."), and *Smith* v. *Robinson*, 468 U.S. 992, 1012-1013 (1984) (Congress intended plaintiffs with cognizable claims under the Education of the Handicapped Act to follow administrative procedures prescribed by that Act rather than to bring suit directly under more general provisions). As to petitioner's claim that not even Section 501 actions require the application of Title VII procedures, petitioner offers no sufficient basis for this Court to review the well-established view of all the courts of appeals, which is based directly on the plain language of Section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. 794a(a)(1). The fact that that Section declares Title VII procedures to be "available" means—since Congress has made no other procedures "available"—that they must be followed if a claim is to be pursued at all, and not, as petitioner would have it, that those procedures are optional.

Since those courts that recognize Section 504 actions require the same compliance with Title VII procedures that is required in Section 501 actions, the existence vel non of a Section 504 action is not an issue of general importance warranting this Court's review. And, although the court of appeals rejected petitioner's Section 504 claim for failure to state a cause of action, that court has already made clear that it would apply Title VII procedures if it did recognize such a cause of action (*Boyd*, 752 F.2d at 413). Thus, even if the court of appeals were reversed on the question whether there is a Section 504 action, petitioner's Section 504 claim would still stand or fall with her Section 501 claim, which the court of appeals has already rejected.[10]

2. Petitioner also contends that a plaintiff who files suit within the 30-day period of Section 717(c), but does not serve any federal party until after the 30-day period and does not name the proper defendant until five months after she files her suit, should be allowed to proceed as if suit had been brought in a timely fashion. Her contentions in this regard are precisely identical to those made in *Cooper*, and there

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[10] Petitioner claims for two reasons that the court of appeals erred in rejecting her Section 501 claim. One asserted reason—that the court improperly failed to excuse her tardiness in naming the Postmaster General as a defendant—is addressed below. The other—that the Postmaster General is not the proper defendant under Title VII (Pet. 20-21, 33 n.5, 39-41)—is entirely without foundation. Under the Title VII procedures made applicable by Section 505(a)(1), the proper defendant is "the head of the department, agency, or unit, as appropriate" (42 U.S.C. 2000e-16(c)), and petitioner does not and cannot deny that the Postmaster General is the head of the USPS, as all courts to consider the matter have concluded.

is no more reason to grant certiorari on this issue than in *Cooper*.[11] Indeed, there is considerably less reason, because this Court has, since *Cooper*, clarified the application of Fed. R. Civ. P. 15(c) in *Schiavone* v. *Fortune*, No. 84-1839 (June 18, 1986).

a. Petitioner contends (Pet. 19, 41-46, 54-57) that the Court should grant certiorari to determine whether the 30-day time limit of Section 717(c) is subject to waiver, estoppel, or equitable tolling or is, instead, "jurisdictional." In this case (Pet. App. A3), as in *Cooper* (740 F.2d at 716), the court of appeals did make a passing observation that the time limit is "jurisdictional," but in this case, as in that one, the issue that petitioner seeks to raise simply is not presented.

The issue is not presented for two reasons. First, petitioner did in fact file her complaint within 30 days of receipt of the notice of final agency action. Accordingly, neither the district court nor the court of appeals held that dismissal of her suit was required because the doctrines of waiver, estoppel, and equitable tolling are inapplicable in a federal sector Title VII (or Rehabilitation Act) suit. By contrast, the appellate decisions indicating that the 30-day period in Section 717(c) is not "jurisdictional" in nature—which, according to petitioner, conflict with the decision below—deal expressly with situations in which the plaintiff did *not* file an action within 30 days of receipt of the final agency action. See *Zografov* v. *V.A. Medical Center*, 779 F.2d 967 (4th Cir. 1985); *Martinez* v. *Orr*, 738 F.2d 1107 (10th Cir. 1984); *Milam* v. *USPS*, 674 F.2d 860 (11th Cir.

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[11] We are serving on petitioner's counsel a copy of our brief in opposition in *Cooper*.

1982).[12] Second, even if equitable tolling were applicable to failures to name the correct defendant in a timely fashion, as well as failures to file suit in a timely fashion, petitioner, who was represented by counsel, has offered no facts peculiar to her case on which such tolling could be justified.

Therefore, although it is unclear what the court of appeals meant by its passing observation in this case that the 30-day limit in Section 717(c) is "jurisdictional," that characterization is dictum. Because petitioner filed a complaint within 30 days, the issue is properly resolved under Fed. R. Civ. P. 15(c), concerning amendment of complaints to substitute a new defendant. The court of appeals made clear that, if the requirements of Rule 15(c) had been satisfied, it would have held that the amendment related back even though the court stated that the 30-day filing period is "jurisdictional."

b. Contrary to petitioner's contention (Pet. 19-20, 33-38, 46-52), there is no reason for this Court to grant certiorari to review the interpretation of Rule

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[12] Petitioner also maintains (Pet. 41-42) that *Hendrix* v. *Memorial Hospital*, 776 F.2d 1255 (5th Cir. 1985), *Sessions* v. *Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981), and *Saltz* v. *Lehman*, 672 F.2d 207 (D.C. Cir. 1982), conflict with the ruling here. *Hendrix* and *Sessions*, however, do not involve a construction of Section 717(c) at all, but instead address the 90-day limitation applicable under Section 706(f) of Title VII, 42 U.S.C. 2000e-5(f), in suits against private employers and state and local governments. In addition, the court in *Hendrix* was not presented with and did not decide any issue about the jurisdictional or nonjurisdictional nature of any time limitation. Nor does the decision in *Saltz* concern the suit-filing limitation of Section 717(c); it deals only with the time period for filing an *administrative charge*. See 29 C.F.R. 1613.214(a).

15(c) by the court of appeals to require actual notice to the substituted defendant within the statutory time period. Petitioner does not claim that she served the proper defendant with timely notice of her complaint, but argues instead (Pet. 48-49) that the notice requirement should be read to include a reasonable time for service of process under Fed. R. Civ. P. 4.

Last Term, this Court granted certiorari to resolve this precise question, noting "an apparent conflict among the Courts of Appeals." *Schiavone* v. *Fortune*, slip op. 1 (footnote omitted); see also *Cooper*, 471 U.S. at 1024-1025 (White, J., dissenting from denial of certiorari).[13] The Court in *Schiavone* resolved the conflict that petitioner points out by her reliance on the pre-*Schiavone* cases. The Court determined, relying on a literal reading of Rule 15(c), that an amended complaint cannot relate back unless the defendant to be substituted by the amendment had "notice within the limitations period" (slip op. 10). The Court wrote (*id.* at 9):

> We are not inclined * * * to temper the plain meaning of the language [of Rule 15(c)] by en-

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[13] As Justice White's dissent from denial of certiorari in *Cooper* notes, the government argued in that case that the second paragraph of Rule 15(c) requires service of process on one of the federal officials there designated within the time provided by law for commencing the action, whether or not the first paragraph of Rule 15(c) should be construed to allow relation back of an amendment substituting *private* defendants based on service of process within a reasonable time after the timely filing of a complaint (see Br. in Opp. at 15-23, *Cooper* v. *USPS*, *supra*). Now that the Court has rejected the "reasonable time" construction for private defendants, it follows *a fortiori* that it should be rejected for federal defendants.

> grafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint. Rule 4 deals only with process. Rule 3 concerns the "commencement" of a civil action. Under Rule 15(c), the emphasis is upon "the period provided by law for commencing the the action against" the defendant. An action is commenced by the filing of a complaint * * *.

The decision of the court of appeals is accordingly correct.[14]

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[14] Petitioner seeks to distinguish *Schiavone* on the ground that in the present case ascertainment of the identity of the proper defendant was difficult (Pet. 46-48 n.10). Even were that true, it would not seem a sufficient basis to distinguish *Schiavone*, which rested on a literal interpretation of Rule 15(c) and not on the theory that Rule 15(c) applies only when ascertainment of the defendant's identity is easy. In fact, however, it should not have been difficult for petitioner's counsel, who represented her in both the administrative proceedings and the court proceedings, to determine the identity of the proper defendant. Whatever ambiguity existed at the time the action was filed concerning the applicability of Title VII procedures to efforts to raise claims under Section 504 (but see *Prewitt I*, 662 F.2d at 304, and *Prewitt II*, 662 F.2d at 314, both decided well before petitioner filed her complaint), it was quite clear at the time from the language of Section 505(a)(1) that Title VII procedures must be followed in order for petitioner to pursue her Section 501 claim. See note 2, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40335